



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 1168 OF 2001

STOKMAN ROZEN KENYA LIMITED.....PLAINTIFF

V E R S U S

DA GAMA ROSE GROUP OF COMPANIES LTD.....DEFENDANT

R U L I N G

I have before me the Defendant's application by notice of motion dated 26th October, 2005. It seeks stay of all further proceedings in this suit pending hearing and determination of **Civil Appeal No. 270 of 2005** now pending before the Court of Appeal. The appeal is against the decree passed herein on 15th July, 2005. That decree gave judgment to the Plaintiff against the Defendant for the equivalent in Kenya Shillings of Netherland Guilders (NLG) 170,719/00, the rate of conversion to be that obtaining at the time of filing suit. The Plaintiff was also awarded interest on that principal sum at court rates from the date of filing suit until payment in full as well as costs of the suit.

The application is brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules). The only ground for the application stated on the face thereof is that the Defendant has timeously filed an appeal against the judgment, and that this appeal may be rendered academic by further proceedings in the suit. The application is supported by the affidavit of one HORATIUS DA GAMA ROSE, the group managing director of the Defendant. It is deponed in that supporting affidavit that the Plaintiff has only two directors who are non-Kenyans and thus capable of migrating to their home country at any time; that the Plaintiff has no known fixed assets within the jurisdiction of the court; that on the hand the Defendant is a Kenyan company with substantial immovable properties within Kenya; that the Defendant shall be able to pay the decretal sum if its appeal fails; and that should the Plaintiff's bill of costs be taxed the Defendant's appeal would be greatly prejudiced.

The Plaintiff has opposed the application as set out in the replying affidavit filed on 8th December, 2005. It is sworn by one JAMES HUTCHINGS, its general manager. The grounds of objection to the application emerging from the replying affidavit are:

1. That an order to stay taxation of costs should never be made.
2. That taxation of the Plaintiff's costs will not prejudice the Defendant's appeal in any way as there is no prayer for costs of the counterclaim in the memorandum of appeal.
3. That there has been undue delay in bringing the application.
4. That the Plaintiff is not a foreign company but a locally incorporated one governed by the laws of Kenya
ny event, it has its own legal entity separate from its directors.
5. That the Plaintiff has significant interests in Kenya with assets worth more than KShs. 400 million and an annual turn over of over KShs. 220 million.
6. That the Defendant has not demonstrated that it stands to suffer any substantial loss unless the order sought is granted.
7. That the Defendant has not offered any security for the due performance by it of any decree or order that may ultimately be binding upon it should its appeal fail.

There is a supplementary affidavit sworn by the same Horatius da Gama Rose in response to the replying affidavit. It lists certain properties within Kenya that the Defendant owns.

I have considered the submissions of the learned counsels appearing, including the cases cited. I need not refer specifically to them because they are not directly relevant; they deal with applications under rule 5 of the Court of Appeal Rules.

As worded, the Defendant's application is not seeking stay of execution of decree; it seeks stay of all further proceedings in this matter. From the affidavits filed in support of and in opposition to the application, the only further proceedings now pending is taxation of the Plaintiff's costs awarded in the decree. So, the Defendant is seeking stay of taxation of the Plaintiff's costs.

The question that naturally arises is, to what end should taxation of the Plaintiff's costs be stayed? To put it another way, what prejudice will be occasioned to the Defendant by ascertainment of the Plaintiff's costs awarded in the decree. To my mind, there cannot be any prejudice at all to the Defendant, particularly because the Defendant has not sought stay of execution of the decree. Even if stay of execution of the decree had been sought, there would still be no justification for the court to hinder ascertainment by taxation of the Plaintiff's costs.

Although sub-rule (1) of rule 4 of Order 41 aforesaid is not quite clearly worded, the court appears to have jurisdiction under it to order stay of proceedings for sufficient cause. In the present case no such sufficient cause has been demonstrated. Taxation of the Plaintiff's costs will not affect or prejudice the Defendant's appeal in any way. It has not even been specifically alleged that should the Plaintiff's costs be paid the Defendant will have any difficulty recovering the same should its appeal succeed.

It may be argued that an order for stay of all further proceedings must of necessity stay execution of decree as well, and that therefore by seeking stay of all further proceedings the Defendant has thereby also sought stay of execution of decree. This cannot be so because rule 4 aforesaid of Order 41 provides for both stay of execution of decree or order and stay of proceedings. So, stay of execution must be specifically sought; it cannot not be inferred.

Having considered all the matters placed before the court, I find no merit in this application. I must refuse it. It is hereby dismissed with costs to the Plaintiff. Order accordingly.

DATED AT NAIROBI THIS 23RD DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 24TH DAY OF AUGUST, 2007